U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 25 May 2006

CASE NO.: 2005-LHC-02311

OWCP NO.: 01-160706

In the matter of:

MATTHEW CONNOLLY
Claimant

v.

JAY CASHMAN CONSTRUCTION COMPANY, INCORPORATED
Employer

and

COMMERCE & INDUSTRY INSURANCE
Carrier

Appearances:

Brian S. McCormick, Esq., Orlando & Associates, Gloucester, Massachusetts, for the Claimant

Edward W. Murphy, Esq., Morrison Mahoney LLP, Boston, Massachusetts, for the Employer and Carrier

Before: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This case arises from a claim for worker's compensation benefits filed by Matthew Connolly ("Claimant") against his employer, Jay Cashman Construction Company, Incorporated ("Employer" or "Cashman") and its Carrier, Commerce and Industry Insurance

("Carrier") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("LHWCA" or "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in Boston, Massachusetts on January 5, 2006, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and the Carrier. The Hearing Transcript is referred to herein as ("TR"). At the hearing the parties offered stipulations, which were marked as Joint Exhibit ("JX") 1. By letter dated February 14, 2006, the parties filed a document titled "Stipulations of the Parties Regarding Typing Competency and Average Weekly Wage" with additional stipulations which has been marked as JX 2 and admitted. Testimony was heard from the Claimant, Mr. John Joyce, safety manager at Cashman, and Ms. Marita Torbick, the Employer's vocational expert. TR 5, 13, 20. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-12[1] and Employer's Exhibits ("EX") 1-22. TR 10-11. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-6. TR 11-13. After the hearing, the parties filed briefs. The record is now closed.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties have stipulated to the following:

1. The LHWCA, 33 U.S.C. § 901, *et seq.*, as amended, applies to this claim;
2. The injury occurred on November 25, 2003;
3. The injury occurred at Weymouth, Massachusetts;
4. The injury arose out of and in the course of the worker's employment with the Employer;
5. There was an Employer/Employee relationship at the time of the injury;
6. The Employer was timely notified of the injury;
7. The claim for benefits was timely filed;
8. The Notice of Controversion was timely filed;
9. Temporary total compensation has been paid from November 26, 2003 to February 22, 2005 at various rates;
10. Medical benefits have been paid in the amount of $49,053.20;
11. The Claimant has been temporarily totally disabled since November 26, 2003;
12. The Claimant has not returned to his usual job;
13. By June 6, 2007, the Claimant will be able to type 60 words per minute;
14. The applicable average weekly wage is $2,500.00.

JX1; JX 2

[1] The Claimant submitted two additional exhibits post-hearing: CX 11, the Vocational Rehabilitation Contract, and CX 12, the Claimant's fall semester grades. In his letter, the Claimant represented that the Employer had no objection to the admission of the two documents. The documents were admitted.

The issue in dispute is the nature and extent of the Claimant's disability.

III. Findings of Fact and Conclusions of Law

A. Claimant's Testimony

The Claimant, Matthew Connolly, was born on May 27, 1962, and was 43 years of age at the time of the hearing. TR 20. After graduation from high school, the Claimant enlisted in the Navy. TR 21. He spent six years in active service, where he maintained jet engines and equipment for jets. TR 21-22. The highest rank the Claimant obtained was Petty Officer. TR 22. He received an honorable discharge, and continued with the reserves for four years, working with jets. TR 22. After his discharge from the Navy, the Claimant became a laborer for Local 133, which operated out of Quincy, MA. TR 23. The Claimant also testified that after leaving the Navy, he worked full time while going to school at Tad Technical Diesel School, where he studied diesel engines and hydraulics. TR 67.

After two to three years of laboring with Local 133, the Claimant applied and was accepted to an apprenticeship program with the Operating Engineers Union, Local 4. TR 23. This program required the Claimant to attend four years of school, two nights per week and every Saturday, while working on job assignments through the union during the day. TR 23-24. In 1994, the Claimant graduated from the apprentice program and continued to work out of the union until his injury. TR 24. While the Claimant worked for Local 4, he was a mechanic and worked for different employers as assigned from the Union Hall. TR 25. He worked for the Employer, Jay Cashman "on and off." TR 25.

The Claimant last worked for Cashman in November of 2003 as an onsite mechanic, at the Weymouth Port. TR 26-27. In this position, the Claimant worked from 6 a.m. to 6 p.m., seven days per week. TR 27. This position required the Claimant to maintain the equipment, which included oil changes, fixing and replacing broken parts, and ensuring that the machines were fueled. TR 27. The Claimant testified that the pace of the work was intense, and that the job required much heavy lifting. TR 28. The Claimant testified that his toolbox easily weighed over sixty pounds, and that his wrenches weigh over 100 pounds. TR 29. The Claimant was also required to climb on equipment, such as on cranes, onto barges, and on ladders to reach tug boats. TR 29. He often worked on uneven surfaces. TR 30. Being a mechanic also required the Claimant to get into awkward positions, such as laying down, kneeling and stooping. TR 30.

The Claimant testified that prior to his injury, he believed himself to be in excellent health. TR 30. His past health history includes an amputated left big toe as a result of an injury in which a crane crushed his foot, and a back injury. TR 31. The Claimant testified that these injuries were not troubling him at the time of the injury in question in this case. TR 31.

The Claimant was injured on November 25, 2003. TR 31. At the time of the injury, the Claimant was working with other employees to put a crane away, and to remove the crane from the "big wooden pads that the crane sits on." TR 32. The Claimant testified that he was on top of the crane, putting the operator pull or stabilizer in place, when his foot was crushed by the stabilizer. TR 32. The Claimant was taken from the scene by ambulance to Boston University Medical Center, where he received emergency trauma surgery. TR 32. The Claimant testified that he believes the surgery inserted two to three screws in his ankle. TR 33. The Claimant was in the hospital for approximately one week, during which time the Claimant's foot was in an open cast, so that doctors could check for gangrene. TR 33. When the Claimant was discharged, his leg was cast up to his knee, and he worked with Drs. Tornado and Creevy, of the orthopedic clinic. TR 33-34. The Claimant visited the clinic approximately once per week. TR 34. Eventually, the Claimant's cast was changed to a half-cast or an open cast, to allow more air to reach his wound so it would heal more quickly. TR 34. At some point after this, the Claimant received a walking cast. TR 34.

When the Claimant first left the hospital, he lived with his brother for approximately four months. While there a visiting nurse and a physical therapist treated him in-home. TR 35-36. After his home therapy ended, he started going to Brockton Hospital for outpatient therapy, at first five days per week, then three days per week. TR 35.

The Claimant testified that once he completed physical therapy at Brockton Hospital, he was referred to a work hardening program at either Brockton Hospital or Healthsouth, which he began in June or July of 2004. TR 36. The therapy lasted four hours per day, five days per week. TR 36. During the therapy, the Claimant practiced the basics of walking, then progressed to practicing skills related to weight carrying, weight bearing, climbing ladders, and regaining stability. TR 36. After the four-hour session, the Claimant reports that his leg was sore and he was in significant pain, which forced him to go home and rest. TR 37. The Claimant's work hardening program lasted for three to four months. TR 37. The Claimant also engaged in a second round of work hardening therapy until November of 2004. TR 38.

On August 11, 2004, during the first round of the work hardening program, the Claimant received a return to work offer from John Joyce, the Safety Insurance Manager at Cashman. TR 56; CX 8. The Claimant testified that he understood the offer to be for a position as a driver. TR 57-58. The Claimant lost his driver's license in 2002 and he testified that Cashman management knew that he did not have driver's license because the company had requested copies of all employees' licenses.[2] TR 58, 60, 79. The Claimant was confused about the job offer as the work hardening program he was in imposed significant time constraints, he wanted to consult his doctor on whether the physical requirements were consistent with his capabilities and to check with his union to approve of the job. TR 59. The Claimant referred the letter to his attorney, Brian McCormick, Esq. TR 59. On August 18,

[2] The Claimant had petitioned to get his license back and the hearing was set for March 2005, however he testified that the attorney representing him was indicted and unable to continue representing him. TR 61. Mr. Connolly stated that the judge presiding over the matter declined to hear the case without the Claimant's attorney. TR 79. Mr. Connolly stated that the attorney has not refunded his retainer fee nor has he returned the Claimant's files. TR 62. Since the Claimant is unemployed and has no income, he testified that he cannot afford to have another attorney represent him in the matter at this time. TR 62.

2004, Mr. McCormick sent a letter to Mr. Joyce, inquiring about the specifics of the position being offered, indicating the Claimant was scheduled to see his physician within twelve days states that he wanted to receive the doctor's feedback on the specifics of the position and informing him that the Claimant did not possess a driver's license. CX 7. Mr. Joyce wrote back to Mr. McCormick on August 20, 2004, stating that a job as a driver met the restrictions imposed by the Claimant's doctor, and indicating that the rate of pay would be $32.44 per hour, and that the Claimant could work as many hours as he felt capable of performing. CX 6. Mr. Joyce did not offer any further details. On September 1, 2004, Claimant's Counsel sent another letter to Mr. Joyce again asking about the nature of the position being offered and inquiring as to whether it was a driving position. CX 5. In this letter counsel reiterated that Mr. Connolly did not have a driver's license and that he was to begin a work hardening program which would present obstacles to a return to work. Mr. Joyce did not respond to this letter.

The Claimant testified that in November 2004 he sought the opinion of another orthopedist, Dr. Corbett, a foot specialist who works at Needham Mosey Hospital. TR 38. The Claimant testified that Dr. Corbett took x-rays and a CAT scan in December of 2004, but that Dr. Corbett was unable to improve the Claimant's condition. TR 39. Since then, the Claimant has had no further physical therapy. TR 39.

In January or February of 2005, the Claimant was contacted by Michael La Raia, a vocational rehabilitation counselor working with the U.S. Department of Labor's Office of Workers' Compensation Programs. TR 40. The Claimant understood that Mr. La Raia would help him to retrain and find a new career. TR 40. During their first meeting, the Claimant testified, Mr. La Raia told the Claimant that he would speak to the Employer about returning to work there, but the Claimant did not hear from Mr. La Raia again until March. TR 40. In subsequent meetings, the Claimant and Mr. La Raia discussed welding, fabricating, and underwater diving welding as possible career options. TR 41. After further investigation, none of these were deemed to be viable opportunities. TR 41. The Claimant expressed interest in being a crane inspector, but testified that Mr. La Raia did not believe this to be a good career option. TR 42. Eventually, Mr. La Raia recommended that the Claimant enroll in college for either business or architecture. TR 43. The Claimant was accepted into Massasoit Community College for architectural technology, which is a two-year program and will lead to an associate of science degree. TR 43. The Claimant stated that his goal is to become a job supervisor, foreman, blueprint reader, design person, or foreman. TR 43.

The Claimant started school on September 6, 2005, taking several classes. TR 44-45. During the fall semester, the Claimant spent five to six hours per day in class. TR 44. The Claimant testified that he also spent many hours studying and utilizing tutoring services offered by the school. TR 44-45. The Claimant testified that his classes started at 8 a.m., and that he would usually arrive at approximately 7:15, to study for his first class. TR 45. Classes would generally finish at 1 p.m. or 1:30 p.m. TR 46. After class, the Claimant would go home and study, stay for tutoring, or stay to complete research. TR 46. On average, the Claimant estimated, he spends about fifty or more hours per week between going to class, tutoring, and studying. TR 46-47. Although the Claimant had no class on the weekends or on Mondays, he testified that he spent much of his free time studying. TR 82. The Claimant

only missed one day of school during the fall semester, due to a deposition. TR 48. The Claimant testified that he currently uses computers for school, for purposes including word processing, e-mail and research. TR 69-70. The Claimant achieved an overall grade point average of 3.54 during the fall semester. CX 12.[3]

The Claimant testified that the Employer stopped paying his disability compensation benefits in February 2005. TR 65. He also testified that he received no notice of the termination. TR 65.

At the time of the hearing, the Claimant testified that he was taking an accelerated algebra course during the winter intersession. TR 49. During the spring semester, the Claimant anticipated taking physics, methods and materials, English, math, and construction planning. TR 49. The Claimant testified that he believed he would spend more time in school during the spring semester because the classes were scheduled with breaks between them, and because the new classes required more lab time. TR 49. He also testified that he believed the spring semester would be more difficult for him as a result of the physics class. TR 49-50. He expects to use the tutoring services again in the coming semester. TR 50. The Claimant testified that he did not think he could work while going to school full time, because his school schedule was rigorous and would not permit work. TR 50.

The Claimant testified as to his physical condition since the accident, stating that he has pain in his left leg which varies in intensity from tolerable to extreme. TR 53. He reported that he can stand for two or three hours on a bad day, and four or five hours on a good day. TR 51. The Claimant explained that he knows he has to rest when he becomes fatigued, or he experiences sharp pain in his foot. TR 51. The Claimant reports that he walks approximately a half-hour per day on most days, but that some days he cannot walk. TR 52. When he walks or stands for long periods of time, the pain increases. TR 53. He testified that he has trouble with balance; he feels "wobbly" and his foot "gives out." TR 52. The Claimant also testified that he has trouble walking on uneven surfaces and difficulty with climbing stairs and ladders. TR 52-53. He stated that sometimes sitting for long periods of time bothers him, and he has to get up and walk, because he gets "pins and needles." TR 53. The Claimant reports that he believes that he can lift up to sixty pounds one time, from the floor to waist level. TR 75. The Claimant also testified that he rides a bicycle, because the rotating motion of the pedals is good for his foot. TR 76. At times he rides the bicycle to commute to school. TR 76, 80.

At the end of each day, the Claimant said that he has pain in the ankle and must rest his leg for an hour. TR 53. The Claimant also testified that the pain in his leg at times affects his ability to concentrate on school work. TR 54. Sometimes, he testified, he must rest his leg when he knows that he needs to study, so he has to make up the study time. TR 54. He also testified that because of the pain in his leg, "I haven't had a good sleep in a long time," and that he has to take medication to get to sleep, and sometimes he wakes up in the middle of the night and cannot get back to sleep because of the pain in his leg. TR 54. He testified that

[3] The Claimant received a "B+" in the College Experience, an "A-" in Electrical Systems, an "A" in Introduction to Writing, a "B" in Computer Aided Drafting, and "A-" in Fundamentals of Math. CX 12.

when he is unable to sleep, it negatively affects his studying. TR 54. He no longer takes pain medication, with the exception of over-the-counter pain relievers. TR 54.

Beginning in January of 2005, the Claimant resumed working around his house, including landscaping, mowing the lawn, cleaning and maintaining the house. TR 62-63. The Claimant testified that he is generally able to mow the lawn for approximately one hour before his foot hurts too much to continue. TR 63. Sometimes, he breaks the job into two days to avoid increasing pain in his foot. TR 63. He adjusts his schedule for all household tasks according to how he feels on a particular day. TR 63-64.

The Claimant testified that he does not believe that he can return to his former job because he can no longer carry the weight required. TR 55. The Claimant stated that he has never typed as part of a job. TR 64. He testified that his typing, spelling, and grammar skills need improvement. TR 65. He characterized his typing skills as "[a] woodpecker. One finger at a time." TR 65. The Claimant indicated that he is focusing on his studies as part of his effort at vocational rehabilitation, and is not looking for work. TR 55.

B. Mr. John P. Joyce

John P. Joyce, the Safety and Insurance Manager at Jay Cashman, testified on behalf of the Employer. Mr. Joyce testified that he has been employed at Cashman as the Safety and Insurance Manager for seventeen years, and currently works part-time. TR 87. In this position, Mr. Joyce testified, he oversees worker's compensation insurance, general liability insurance, marine insurance and safety programs. TR 89-90. Before working for Cashman, Mr. Joyce was a member of the state police. TR 88. Mr. Joyce testified that Cashman had several hundred employees at the time of the Claimant's accident, and would have from ten to twelve projects at once. TR 89.

Mr. Joyce testified that on August 11, 2004, he extended a return to work offer to the Claimant. TR 90. Mr. Joyce testified that the claims person handling the Claimant's case for the insurance carrier told him that the Claimant was "capable of doing limited work or light duty type work and that if I had a position for him, I should offer it to him." TR 90. Mr. Joyce testified that the Return to Work Physical Capabilities form (EX 9) he received said that the Claimant was capable of driving, and that he knew the Claimant had driven for Cashman before, so he "wrote in a letter that was one of the things he could do for us." TR 90. The letter stated:

> We have been informed that you are now able to return to work with restrictions. It appears that you are capable of driving also standing or walking 2 to 4 hours in an 8-hour workday. Sterling Equipment Co. does have a position meeting your restrictions as a driver for example.
>
> Please contact me by Wednesday 8/18/04 in order to make the necessary arrangements for your return.

CX 8. At hearing, Mr. Joyce testified that this position would require driving a vehicle to pick up equipment or run errands. TR 93. He also testified that the Claimant could work as many hours as he felt capable of working. TR 94. He explained that, in general, light duty positions are available between the hours of 8:00 a.m. and 3:00 p.m. TR 107-108. No positions were available in the late afternoon or evening hours, for example between 6:00 and 9:00 p. m. TR 108. The rate of pay would have been the same as the Claimant's pay as a mechanic. TR 96. Mr. Joyce testified that he was surprised to learn that the Claimant had no driver's license, "[b]ecause I did not know obviously that Mr. Connolly did not have a license or I certainly would not have offered him a job driving a vehicle." TR 94-95. Mr. Joyce also stated that there were other positions available. TR 102. He testified that these positions included office work, administrative work, phone work, filing work, and inventory work. TR 109.

Mr. Joyce testified that he did not approve the vocational rehabilitation program course of study the Claimant has undertaken, but also stated, "not that I would not approve of it. It sounds like a pretty good program." TR 101.[4] Mr. Joyce was also not aware of any other representative of Cashman approving the program. TR 101. He recalled speaking to Mr. LaRaia, the vocational specialist working with the Claimant, but could not recall the exact nature of their conversations. TR 108.

C. Medical Evidence

1. Dr. William Creevy

Dr. William Creevy, M.D., is an assistant professor of orthopedic surgery.[5] CX 3 at 25. Although the records of the Claimant's surgery were not admitted, it appears both from the notes of the other doctors, as well as Dr. Creevy's records, that that Dr. Creevy and Dr. Paul Tornetta performed surgery on the Claimant's ankle. *See* EX 1 at 1; CX 3 at 20-25. Dr. Creevy saw Mr. Connolly on an ongoing basis following his surgery in November 2003. CX 3. In November and December of 2003, Dr. Creevy monitored the Claimant's wounds and recommended that the Claimant remain non-weight bearing. CX 3 at 21-25.

As of January 13, 2004, Dr. Creevy allowed the Claimant to begin partial weight bearing on his injured leg with a walker boot, advancing to weight bearing as tolerated. CX 3 at 20. At this time, Dr. Creevy also prescribed an "outpatient therapy program for range of motion, strengthening and gait training." *Id.* At his February 10, 2004 visit, Dr. Creevy recommended that the Claimant continue physical therapy. CX 3 at 19. On March 3, 2004,

[4] Mr. Joyce's testimony in this regard is in stark contrast to the disparaging statement in the Employer's brief: "Indeed, based upon the insurer's prior prolonged, but unsuccessful retraining experiences with the same vocational expert in this case, LaRaia, it certainly would not agree to such a plan." Er. Br. at 21. There is no evidence in the record regarding the Employer or Insurer's prior experience with Mr. La Raia and the Employer's official, Mr. Joyce, testified that the vocational training program appeared to be "pretty good." TR 101.

[5] Dr. Creevy's notes do not indicate where he is an assistant professor of orthopedic surgery, nor did the Claimant submit a curricula vitae for Dr. Creevy.

Dr. Creevy instructed the Claimant to continue with therapy, focusing on range of motion, strengthening and functional activities. CX 3 at 18.

On April 7, 2004, Dr. Creevy's office estimated that the date of maximum medical improvement would be approximately one year from the date of the injury. EX 5 at 14. At the April 27, 2004 office visit, Dr. Creevy's progress note states that the Claimant had reached maximum improvement from the standard therapy. CX 3 at 17. However, at this point, he recommended "a more vigorous hardening and reconditioning program." *Id.*

On June 8, 2004, Dr. Creevy recommended that the Claimant continue with therapy and work hardening. CX 3 at 16. As of July 13, 2004, the Claimant was cleared by Dr. Creevy to return to work in a limited duty capacity. CX 3 at 15. Dr. Creevy also recommended that the Claimant continue with work hardening, as the Claimant was making "some progress." *Id.* Dr. Creevy's physical restrictions for the Claimant's return to work included: standing and/or walking for 2-4 hours per day, alternating sitting and standing, no squatting, no bending, driving an automatic vehicle only, and occasional lifting limited to twenty to forty pounds. CX 3 at 14.

On August 31, 2004, Dr. Creevy reported that the Claimant was continuing with therapy and work hardening, "making some progress." CX 3 at 13. Dr. Creevy recommended that the Claimant continue with therapy and work hardening. *Id.* At the October 26, 2004 office visit, Dr. Creevy stated that the Claimant could return to work in a light duty capacity, if such work was available. CX 3 at 11. Dr. Creevy also recommended that the Claimant continue with therapy. CX 3 at 11.

2. Dr. Paul Tornetta

Dr. Paul Tornetta, M.D. followed the Claimant along with Dr. Creevy after his surgery. CX 3 at 22. In addition, he saw the Claimant on December 21, 2004. EX 15 at 29. As of December 21, 2004, Dr. Tornetta released the Claimant for "full activities" and prescribed "aggressive physical therapy" for range of motion of the ankle, subtalar joint and midfoot joint." EX 15 at 29.

3. Dr. John Doherty

Dr. John Doherty, Jr., M.D., P.C. is an Orthopedic Consultant who practices out of Needham, Massachusetts. CX 1 at 1. He saw the Claimant on August 23, 2005 and reviewed records from Boston Medical Center, Dr. Michael Corbett, and Dr. Charles DiCecca. *Id.* Dr. Doherty opined that the Claimant had "sustained a rather severe crush injury to the left ankle and subtalar joints. The subtalar joint seems to have sustained more injury than the ankle joint." CX 1 at 2. He also noted sclerosis of the subtalar joint and the fact that there was no motion in that joint. *Id.* Dr. Doherty also observed subchondral cysts on the body of the talus, which indicate that the Claimant "had some damage to the articular surface of his talus at the time of his medial malleolar injury." *Id.*

Dr. Doherty opined that the Claimant could not return to work as a construction worker, as he was unable to walk or stand "for any length of time," to go down stairs, or walk over uneven surfaces. *Id.* Therefore, Dr. Doherty recommended that the Claimant be retrained in another field. *Id.* The doctor also predicted that the Claimant may need further treatment of his ankle and subtalar joints, and stated that osteoarthritis was possible in both joints. *Id.* Dr. Doherty estimated that the Claimant had sustained a 20% impairment of the left lower extremity, and stated that the Claimant's prognosis was only fair because of the severity of his injury. CX 1 at 3.

4. Dr. Michael Corbett

Dr. Michael Corbett, M.D., of the Boston University Medical Center and the Beth Israel Deaconess Hospital Needham Orthopedics and Sports, saw the Claimant beginning on November 2, 2004. CX 2 at 10. The Claimant sought a second opinion and was referred to Dr. Corbett, a foot specialist.[6] TR 38. At his initial examination of the Claimant, Dr. Corbett noted that the Claimant sustained a crush injury to his left foot, and was treated with an open reduction/internal fixation. *Id.* As of November 2004, Dr. Corbett documented that the Claimant had persistent pain, poor balance and swelling. *Id.* The Claimant's fracture was described as "an open injury." *Id.* His status at that time was "post open reduction/internal fixation of a malleolar fracture with the hardware in excellent position and alignment…no sign of ankle osteoarthritic changes…. The subtalar joint itself appears somewhat sclerotic on lateral and Gissane's angle appears to have been obliterated." *Id.* Dr. Corbett ordered a CT Scan of the left subtalar joint. *Id*.

On December 17, 2004, Dr. Corbett reviewed the CT scan and noted "small subchondral cyst in the most medial aspect of the talar, some likely degenerative changes-sequela of prior medial malleolar fracture" and "small anterior distal tibial osteophytes consistent with osteoarthritis of the tibiotalar joint." CX 2 at 8, 6.

On February 8, 2005, Dr. Corbett examined the Claimant, reviewed the CT scan, and observed that the scan was "consistent with post-traumatic osteoarthrosis involving the ankle and subtalar joint." CX 2 at 5. Dr. Corbett informed the Claimant that there is "no specific therapy for his arthritic condition…." *Id*. Dr. Corbett was unable to determine the cause of the intermittent stabbing pain the Claimant experienced, but suggested the medial calcaneal nerve may be being irritated, although he could not confirm this theory. *Id*. Dr. Corbett suggested that the Claimant "simply return to work with increasing activity as tolerated." *Id.* On February 21, 2005, Dr. Corbett completed a work capacity evaluation form assigning work restrictions which limited walking, standing and climbing. CX 2 at 4. Dr. Corbett also indicated that maximum medical improvement had not been reached at this point. *Id*.

5. Dr. Charles A. Di Cecca

Dr. Charles Di Cecca, M.D. examined the Claimant at the Employer's request on May 2, 2005. EX 1 at 1. Dr. Di Cecca attended the Medical College of Wisconsin, and is a board

[6] No curricula vitae or other evidence of Dr. Corbett's expertise has been submitted. The Claimant testified that Dr. Corbett is a foot specialist. TR 38.

certified orthopedic surgeon. EX 3 at 10. Dr. Di Cecca observed on examination that the Claimant walks with an antalgic gait. EX 1 at 4. He also noted "small cystic changes in the medial dome of the talus and perhaps very small marginal osteophytes on the anterior tibia." Dr. Di Cecca found subtalar sclerosis and possible degenerative changes in the subtalar joint. EX 1 at 5. He concluded that the Claimant had suffered a "crush injury to the left foot and ankle resulting in multiple skin wounds and a displaced open fracture of the medial malleolus. EX 1 at 5.

Dr. Di Cecca described the Claimant's prognosis as fair, due to the evidence of mild ankle joint arthritis and the arthritic changes of the subtalar joint. EX 1 at 5. Dr. Di Cecca determined that the Claimant had reached maximum medical improvement as of his examination. EX 1 at 5. He estimated that the Claimant reached maximum medical improvement approximately one-year after the date of injury, or about the same time as the Claimant stopped physical therapy due to the fact that no further benefit could be gained from such therapy. EX 2 at 8. Dr. Di Cecca found the Claimant eligible to "return to work on an eight hour day schedule in a light duty capacity where walking, standing, kneeling and activities related to his work can be controlled and appropriately restricted." EX 1 at 5. Dr. Di Cecca recommended restricting the Claimant's lifting to less than thirty-five pounds. EX 1 at 5. He estimated that the Claimant had suffered a 15% impairment to the left lower extremity. EX 1 at 5-6.

6. Theresa Murphy, Healthsouth Braintree Rehabilitation Hospital

Theresa Murphy, P.T., of Healthsouth Braintree Rehabilitation Hospital, Center for Occupational Rehabilitation, performed a Physical Therapy Functional Capacity Evaluation of the Claimant on May 12, 2004 to determine whether the Claimant was able to return to work. CX 4. The evaluation tested the maximum strength for performing infrequent tasks, and endurance through an obstacle course, which determines the amount of weight that can be lifted repetitively over time. CX 4 at 27.

In the dynamic lifting test, Ms. Murphy stated that the Claimant "demonstrated fair body mechanics….an increased antaglia when carrying…and reported his pain level increased to 8 to 9 out of 10 vs. 6 out of 10 at the start of this evaluation." CX 4 at 27. During the endurance portion of the test, the Claimant lifted thirty-five pounds floor to waist, walked 150 feet, ascended and descended fourteen steps, ascended and descended a ten foot ladder, and lowered thirty-five pounds from the waist to the floor a total of ten times in thirty minutes. CX 4 at 28. Ms. Murphy noted that the Claimant "demonstrated antaglia when walking and when ascending and descending the ladder he was slow and deliberate with each step. He reported increase in paresthesias and in left ankle at the end of this section and pain increased to 9 out of 10." CX 4 at 28.

Ms. Murphy concluded that the Claimant had not met the physical requirements to return to work at Cashman, even in a modified capacity. CX 4 at 29. She noted that the Claimant demonstrated the ability to lift up to sixty pounds from the floor, forty pounds above waist level, pivot fifty-four pounds, and carry twenty-six pounds. CX 4 at 29. She also noted that the Claimant was capable of carrying thirty-five pounds frequently. CX 4 at 29. Ms.

Murphy recommended a course of work hardening. CX 4 at 29. The Claimant subsequently participated in a work hardening program.

D. Vocational Rehabilitation

1. Mr. Michael La Raia

Michael La Raia is a rehabilitation counselor for Solutions Consulting, which operates out of Lakeville, Massachusetts under contract with the U.S. Department of Labor's OWCP. CX 10. Mr. La Raia did not testify, but the Claimant has submitted several Vocational Rehabilitation Reports prepared by Mr. La Raia under the arrangement with OWCP. CX 10. The February 14, 2005 report indicates that Mr. La Raia first met with the Claimant on February 7, 2005. CX 10 at 46. The notes from the first meeting indicate that Mr. La Raia spoke to the Claimant, spoke to Mr. Joyce regarding a possible return to work at Cashman, and reviewed the Claimant's medical condition, education and work history. CX 10 at 46-51. Mr. La Raia was attempting to obtain physical or work restrictions from the Claimant's physicians. CX 10 at 49-50.

Mr. La Raia and the Claimant next met on April 20, 2005. CX 10 at 54. During this meeting, the Claimant again expressed interest in returning to work. *Id.* The Claimant also expressed interest in obtaining a certification in underwater welding as a possible next career move. *Id.* This was to be investigated along with an assessment of whether the Claimant's work restrictions would permit a return to prior employment. CX 10 at 54-55.

Mr. La Raia's May 20, 2005 report indicates that a career in underwater welding was not a cost-effective option. CX 10 at 56-57. The Claimant and Mr. La Raia also discussed other potential career options, including crane operating or crane inspection and agreed to research those options. CX 10 at 56-58. Mr. La Raia also arranged for vocational testing to assist in identifying appropriate career options. CX 10 at 57.

The July 29, 2005 report indicates that Mr. La Raia researched crane operating or inspection but found that the positions are not viable options due to occasional physical requirements, such as climbing ladders and balancing on crane booms, which would exceed the Claimant's limitations. CX 10 at 63; *see also* CX 10 at 59-62.

The vocational testing results showed that house keeping and maintenance supervisor, medical records, book keeping and accounting clerk, engineering, x-ray technician, and small business owner were career options with high potential for the Claimant. CX 10 at 59. The Claimant expressed interest in accounting and computer aided drafting ("CAD"), and thus agreed to meet with representatives of Massasoit Community College to discuss the Architectural Technology Program. CX 10 at 63. This degree would allow the Claimant to pursue a career as an architect or civil drafter. CX 10 at 64. Following the Claimant's meeting at Massasoit Community College, the Claimant and Mr. La Raia decided that the Claimant would pursue the two-year degree CAD program at Massasoit, as the Claimant was interested in the program, such a career would meet the Claimant's physical restrictions and the wage potential in the career was good. CX 10 at 63. Mr. La Raia predicted, based on his

research, that the Claimant could earn as much as $48,000 per year. CX 10 at 67. The median income in Massachusetts for this type of career was $42,700.00 in 2003, and such salaries were expected to increase at a rate of 4% over the following years. *Id.* Therefore, the "vocational exploration process" was concluded, and the rehabilitation plan was developed and approved. CX 10 at 70, CX 11. The Claimant began taking courses under the Vocational Rehabilitation Plan on September 6, 2005. CX 10 at 69-70; CX 11.

Mr. La Raia's reports indicate that the Claimant's schooling went well from its inception. CX 10 at 41, 38, 35. The Claimant's grades from his first semester support this claim, as the Claimant received an overall grade point average of 3.54. CX 12.

2 Ms. Marita J. Torbick

Marita J. Torbick testified on behalf of the Employer. Ms. Torbick has a bachelor's degree from Sonoma State University in business, and is a certified disability management specialist. TR 111-112. She testified that she has worked in rehabilitation and psychology since 1986. TR 112. She stated that she currently works for Concentra and that "the bulk of my work is working with people helping them figure out how to return to work after a disabling injury." TR 112-113. She testified that she has worked with many employees from Cashman and other construction companies. TR 113. Ms. Torbick was qualified as an expert in her field without objection from the Claimant. TR 113.

Ms. Torbick testified that she reviewed all of the Claimant's exhibits in this case, as well as observed the Claimant's deposition testimony and his hearing testimony and the testimony of Mr. Joyce. TR 114. Ms. Torbick testified that, based on these observations, she was "most impressed with Mr. Connolly's training." TR 115. She stated that military training is very highly regarded, and that she was impressed that he has extended his education through diesel training. TR 115. She also noted that the Claimant was able to excel in a field that is technical and difficult. TR 115. These facts led her to believe that the Claimant has technical expertise and high learning capability. TR 116. Ms. Torbick also noted that the Claimant is highly employable because he appears to be friendly and likeable, is able to express himself well, and has taken classes beyond those he was required to take. TR 116.

Ms. Torbick prepared a labor market survey on November 21, 2005. EX 17; TR 116. In preparing the labor market survey, she looked into areas that involved the Claimant's existing mechanical and technical skills, including equipment manufacturers and wholesalers, and small engine repair, but found nothing that was "sufficiently light and sedentary" for the Claimant. TR 116-117. Next, she looked for jobs that would enable the Claimant to use the computer skills he had obtained from his classes. TR 117. She also looked for part-time work that would allow the Claimant flexibility. TR 117. Ms. Torbick testified that she researched on the internet, then met with employers and reviewed jobs with them. TR 117. She was looking for work that did not involve lifting over thirty-five or forty pounds, and which did not involve standing or walking for long periods of time. TR 118.

Ms. Torbick identified jobs in four areas: communication equipment operator, automobile self-service station attendant, cashier II, and customer service representative. EX 17 at 32. Ms. Torbick identified two positions in the communications equipment operator area, both as an answering service operator. EX 17 at 33. The first was with Central Communications in Holbrook, Massachusetts, near the Claimant's home. *Id.* The position paid $7.50 per hour, and required employees to have basic computer skills with keyboarding and listening abilities. *Id.* The position was sedentary. *Id.* The second position was with Quincy Telemessaging Applications, in Quincy, Massachusetts, 13.5 miles from the Claimant's home. *Id.* This position required keyboarding skills at twenty to twenty-five words per minute, and experience answering a multi-line phone, although the employer would train if the employee had computer skills. *Id.* This job was sedentary. *Id.* Ms. Torbick testified that these two jobs had hours outside of traditional hours, including weekend and evening hours. TR 122. On cross-examination, Ms. Torbick stated that it would be "difficult to judge" whether the Claimant's one-fingered approach to typing would be an impediment to working in this field. TR 127.

Ms. Torbick also identified two positions as an automobile self-service station attendant. EX 17 at 4-5. The first was at the Plaza Mobil in Braintree, Massachusetts. EX 17 at 34. This position paid $8.25 with a $.50 shift differential, plus full college tuition reimbursement for full-time students, holiday pay, vacation, and some health benefits. *Id.* The position required employees to price items and stock shelves, record sales and inventory, and required the ability to handle money and customer service skills. *Id.* The heaviest lifting required would be a forty pound case of anti-freeze. *Id.* Although this exceeds the thirty-five pound weight limit imposed by the Claimant's doctor, Ms. Torbick testified that the employer agreed to accommodate a person with a lighter weight lifting limit, so that an employee would not be required to lift forty pounds of anti-freeze. TR 129. This position was during the night shift. EX 17 at 34.

The second position in this field was at the Braintree Square Shell, in Braintree, Massachusetts, twelve miles from the Claimant's home. EX 17 at 35. The position paid $7.50 per hour to start. *Id.* The employee would be required to operate the cash register, stock the shelves, clean the store, and tally cash and credit receipts. *Id.* The employer was willing to train the employee. *Id.* Ms. Torbick testified that this job had hours outside of traditional hours, including weekend and evening hours. TR 122. The heaviest lifting required would be a forty pound box of anti-freeze. *Id.* Although this requirement exceeds the thirty-five pound weight lifting limit imposed by the Claimant's doctor, the employer had a dolly available to help move the boxes. TR 129. However, Ms. Torbick conceded that the fact that the position required lifting over the weight limit imposed by the Claimant's doctor made it an inappropriate position for him. TR 134.

Ms. Torbick identified one position as a cashier, at the Showcase Cinema in Randolph, Massachusetts, about five miles from the Claimant's home. EX 17 at 5-6. This position paid $8.00 per hour, with no benefits. EX 17 at 6. All positions were part time, beginning in the late afternoon or early evening, usually running from 5:00 p.m. to 11:00 p.m. or 1:00 a.m. *Id.*; TR 130. The position required sitting for prolonged periods, and walking would be allowed before and after the shift and during breaks. *Id.*

Ms. Torbick identified one position as a customer service representative, with Clean Harbors Environmental Services, Inc., in Braintree, Massachusetts, five miles from the Claimant's home. EX 17 at 6-7. This position paid $30,000-$35,000 per year, with full benefits after thirty days employment. EX 17 at 6. This position required a high school education and "some" college, basic computer skills, and the ability to take orders and process orders by telephone and inputting the information into a computer. EX 17 at 7. This was a sedentary position. *Id.* The employee would be required to work full time days. *Id.* Ms. Torbick acknowledged that the customer service position was not appropriate because the Claimant lacked typing skills. TR 126.

Ms. Torbick testified that it was realistically likely that the Claimant could obtain the positions that she identified in the market survey or similar positions, because of the Claimant's strong work history, and because the Claimant "comes across well and employers are looking for serious, adult employees that will show up for work and be productive." TR 120-121. She also testified that despite his current school schedule, the Claimant could still work in a part-time position. TR 122. She elaborated that, "clearly he has extensive work to do taking the number of courses he's taking and that is a lot of work, but many students do work part-time jobs also with that level of commitment." TR 122. She also testified that even though some employers might find the Claimant's background an unusual background for the type of positions found in the survey, the fact that he is a student "would provide a segue for their accepting him." TR 125. Ms. Torbick testified that generally, her clients who have been out of any formal educational setting for long periods of time find the first semester of school to be the most difficult. TR 132. Ms. Torbick testified that she thought that the Claimant would be capable of working in a job that would "support his retraining program." TR 133.

E. Nature and Extent

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. Nature of the Claimant's Disability

There are two approaches to determine the nature of a disability. The first method to assess "whether an injury is permanent or temporary is to ascertain the date of 'maximum medical improvement.'" *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985) (citing *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977)). A claimant's disability is

permanent in nature if he has any residual disability after reaching maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979). Under the second approach, a disability will be considered permanent if the claimant's impairment "has continued for a lengthy period of time and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968).

In this case, the Employer contends that the Claimant reached maximum medical improvement in the late fall of 2004, approximately one-year after his injury. Er. Br. at 14. The Employer relies on the opinion of Dr. Di Cecca, who explained that at that time, no further treatment was likely to help the Claimant. *Id.* The Claimant argues that he has not yet reached maximum medical improvement and therefore remains temporarily totally disabled. Cl. Br. at 4, TR 14. In the alternative, Claimant asserts, based upon the opinion of Dr. Corbett, that the earliest date of maximum medical improvement is February 8, 2005. Cl. Br. at 4; TR 14.

Dr. Corbett's February 8, 2005 progress note indicates that there is no specific therapy for the arthritic ankle condition. However, on February 21, 2005, Dr. Corbett completed a one-page work capacity evaluation form and checked the box indicating that maximum medical improvement had not been reached at this point. CX 2 at 4. Although Dr. Corbett checked the form indicating maximum medical improvement had not been reached, in his examination of the Claimant two weeks earlier on February 8, 2005, he reported that there was no specific treatment for the ankle condition. He recommended that the Claimant return to work increasing activity as tolerated, and he essentially told the Claimant to return for treatment as needed when he asked the Claimant to keep him informed as to the Claimant's status. CX 2 at 5. Dr. Corbett did not recommend any targeted additional treatment aimed at improving the Claimant's ankle condition. As the one-page work capacity form does not provide an explanation for stating that maximum medical improvement has not been reached and does not appear consistent with Dr. Corbett's examination of February 8, 2005, I accord the one-page form little weight. As Dr. Corbett's February 8, 2005 progress note reflects that no specific treatment exists for the ankle condition, and he effectively releases the Claimant to return on an as needed basis, the one-page work capacity form signed by Dr. Corbett's office provides little support for the Claimant's assertion that he has not reached maximum medical improvement. Additionally, two physicians have assessed permanent impairment ratings. On August 29, 2005, Dr. Doherty stated that the Claimant sustained a 20% impairment to the lower left extremity, but he did not indicate the date the Claimant reached maximum medical improvement. CX 1 at 3. Dr. Di Cecca opined that the Claimant suffered a 15% impairment to the lower left extremity and stated that no additional treatment was required at that point although he noted that the Claimant may need additional treatment as time proceeds. EX 1 at 5-6. After careful consideration of the evidence, I find that the Claimant has reached maximum medical improvement, and therefore that his condition is permanent.

As I have found that the Claimant's impairment is permanent, I must determine the date of maximum medical improvement. Dr. Corbett, the Claimant's treating physician, opined on February 8, 2005 that "there was no specific therapy" for treatment of the Claimant's condition and suggested that he simply return to work. CX 2 at 5. Prior to that point, all of the Claimant's physicians continued to recommend therapy. For example, three months earlier, on December 21, 2004, Dr. Tornetta recommended "aggressive physical therapy for range of motion of the ankle, subtalar joint and midfoot joint, in addition to the therapy that he has been doing." CX 2 at 7. On April 7, 2004 Dr. Creevy's office wrote a note projecting that maximum medical improvement was estimated at one year from the date of injury. EX 5 at 14. On April 27, 2004, Dr. Creevy stated that the Claimant had "reached maximum improvement from standard therapy. It is my opinion that he would benefit from a more vigorous hardening and reconditioning program." CX 3 at 17. From June to August of 2004, Dr. Creevy continued to note that the Claimant was "making some progress" in therapy and work-hardening. CX 3 at 13-16. On October 26, 2004, Dr. Creevy recommended that the Claimant continue with therapy. CX 3 at 11. In contrast to Dr. Creevy and Dr. Corbett who treated the Claimant on an ongoing basis, Dr. Di Cecca, who examined the Claimant once, opined that "it would be reasonable to state that [maximum medical improvement] occurred approximately 1 year after the date of injury. At that point, physical therapy was discontinued as no further benefit was to be gained by continued management." EX 2 at 8.

In determining the date at which the Claimant reached maximum medical improvement, I accord Dr. Creevy's note regarding the anticipated date of maximum medical improvement little weight, as this opinion was given more than six months before November 2004, provides no explanation for the opinion and does not factor in any potential subsequent progress or set-backs. Dr. Di Cecca's opinion that maximum medical improvement was reached in November 2004 is not supported by the record, as the record is replete with evidence that the Claimant's condition was still improving well after November 2004, and up until February 8, 2005. Accordingly, I find that the Claimant reached maximum medical improvement on February 8, 2005.

Having concluded that the Claimant's impairment is permanent, I must determine the severity of the impairment. Two physicians in this case have offered impairment ratings for the Claimant's condition. Dr. Doherty opined that the Claimant has a 20% impairment due to "his loss of motion of his ankle and subtalar joint, his posterial tibial nerve tenderness, and his scarring…along with his limp." CX 1 at 3. Dr. Di Cecca, who performed an independent medical evaluation for the Employer, opined that the Claimant "sustained significant injuries to the left foot and ankle and is likely to be left with modest symptoms of discomfort for the foreseeable future. He also has mild restriction of range of motion of the left ankle, particularly with respect to subtalar motion….it would be reasonable to allow a 15% loss." EX 1 at 5.

The reports of both physicians are generally well reasoned and thoughtful. Both physicians considered the range of motion of the ankle joint and sensory deficit in the ankle joint region in assessing their respective permanent impairment ratings.[7] The Claimant

[7] The Employer's assertion that Dr. DiCecca's impairment rating is entitled to greater weight because he took "specific range of motion measurement" and Dr. Doherty did not take such measurement is unpersuasive.

credibly testified that he suffers much more than "modest discomfort" as a result of his injury. Consequently, I find that taking the average of the two impairment ratings is reasonable under the circumstances. Accordingly, I find that the Claimant has sustained a 17.5% permanent impairment to his left foot.

2. Extent of the Claimant's Disability

Generally, a disability may be characterized as either partial or total. A three-part test is employed to determine whether a claimant's disability is partial or total: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee, which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *Am. Stevedores v. Salzano* 538 F.2d 933 (2d Cir. 1976); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Air America, Inc. v. Director OWCP*, 597 F.2d 773 (1st Cir. 1979); (*Legrow*), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). The claimant may also rebut the employer's showing of suitable alternate employment by demonstrating that he was precluded from working because of participation in an OWCP approved vocational rehabilitation program. *Louisiana Ins. Guar. Assoc. v. Abbott*, 40 F.3d 122, 127-129 (5th Cir. 1994).

In this case, the Claimant has clearly shown, through both his own testimony and the reports of several physicians, that he is unable to return to his former job, which included heavy lifting. The Claimant testified that he does not believe that he can return to his former position due to the heavy lifting requirements of the job, which are up to 100 pounds. Likewise, Dr. Doherty stated that the Claimant could not return to work because of his inability to walk or stand for long periods of time, walk down stairs or over uneven surfaces. Dr. Di Cecca stated that the Claimant could return to work only if walking, standing and kneeling could be restricted, and recommended that the Claimant limit lifting to weights under thirty-five pounds. Based on the above evidence, I find that the Claimant cannot perform his former job because of his job-related injury and that he has successfully established a prima facie case of total disability.

Since the Claimant has established that he is unable to return to his usual job, the burden shifts to the Employer to establish that suitable alternative employment is readily available in the Claimant's community for individuals of the same age, experience and education as the Claimant. This requires proof that there is a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job. To satisfy this burden, the Employer must show the "precise nature, terms, and

---

Although Dr. Doherty did not include specific figures for Claimant's range of motion, he certainly evaluated the range of motion as he explicitly notes the Claimant exhibited deficits in each of the component parts of the ankle and subtalar joints.

availability of the job[s]." *Plourde v. Bath Iron Works*, 34 BRBS 45, 48 (2000) (citing *Legrow*, 935 F.2d at 434).

The Employer argues that under the First Circuit's *Air America Inc. v. Director, OWCP*, 597 F.3d 773 (1st Cir. 1979) decision, the Claimant has a presumed earning power citing the Claimant's "impressive qualifications, experience, education, and military training." Er. Br. at 17. It is noted that the First Circuit has rejected "a mechanical rule . . . that the employer must always demonstrate the availability of an actual job opportunity whenever a claimant shows an inability to perform his previous work," stating that "it is reasonable to require the employer to make such a strong showing when a claimant's inability to perform any available work seems probable, in light of claimant's physical condition and other circumstances such as claimant's age, education, and work experience . . . [but not] [w]here claimant's medical impairment affects only a specialized skill that is necessary in his former employment . . . ." *Air America, Inc.,* 597 F.2d at 779. *Air America* involved a college-educated airline pilot whose disability precluded only a narrow range of positions. The First Circuit found that the claimant's disability affected "only a specialized skill that is necessary in his former employment" and "his resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him." *Id.* at 779. The First Circuit found that the Claimant in the case before it could perform a desk job and in fact had declined a desk job which had been offered to him. *Id.* at 778-779. The First Circuit did not state that the Board's requirement that the employer make a specific showing of the availability of suitable alternate employment was improper in all instances. It merely held that based upon the facts before it such a mechanical rule was unnecessary.

In contrast to the facts before the Court in *Air America*, in the present case the Claimant has a high school education and has received some additional training in diesel engines and hydraulics and his current medical condition leaves him capable of performing only a limited class of work. Far from affecting "only a specialized skill that is necessary in his former employment," the Claimant's injury affects his ability to walk, stand, sit and lift heavy weights, among other things. The Employer's own vocational expert testified that she first attempted to identify positions that would use the Claimant's technical and mechanical skills, but was unable to find anything that was "sufficiently light and sedentary." TR 116-117. Thus, it is clear that the Claimant's disability directly affects his ability to perform jobs for which he is qualified by his education and work experience. Therefore, I find that *Air America* is not applicable to this case and the Employer must demonstrate the availability of specific jobs.

The Employer argues that it established that suitable alternate employment was available to the Claimant. In this regard, the Employer contends that it demonstrated a number of specific "jobs open in the Claimant's community that he could compete for and realistically secure," including the return to work offer and jobs identified in the labor market survey performed by Ms. Torbick. Er. Br. at 15-18. First, the Employer argues that the return to work offer, as stated in Mr. Joyce's letter of August 11, 2004, constituted a demonstration of the Claimant's residual earning capacity. *Id.* at 15-16; *see* CX 8. The Employer asserts that the position was consistent with the Claimant's physical restrictions, that it paid the same

amount per hour as his prior position, and that it was available on a forty-hour per week schedule, but that the Claimant could work as many hours as he could tolerate. Er. Br. at 15-16.

The Claimant argues that the light-duty job offer was "illusory," as it failed to convey basic information, such as the scope of the position, the hours to be worked, and the location of the position. Cl. Br. at 5-6. The Claimant points out that his repeated attempts to ascertain the nature of employment were all but ignored. Cl. Br. at 6; *see* CX 5-7. The Claimant's attorney also informed Mr. Joyce that the Claimant did not have a valid driver's license. *Id.* In a letter dated August 20, 2004, Mr. Joyce responded by stating that Dr. Creevy's Return to Work Physical Capacities form listed driving, no clutches and, therefore, Cashman's light duty offer of 8/11/04 met the restrictions described by the doctor. The letter also provided that the Claimant's rate of pay is $32.44 per hour and his hours would be as many as he felt capable of performing up to eight hours a day. CX 6. The Claimant points out that Mr. Joyce provided no other information regarding the offer. Cl. Br. at 6; *see* TR 105-106. The Claimant also states that Mr. Joyce never offered the Claimant a light-duty position that did not require driving, even after the Claimant's attorney informed him that the Claimant did not possess a driver's license, and despite the fact that according to Mr. Joyce's own testimony at hearing, Cashman "could have easily accommodated the employee in a non-driving position." Cl. Br. at 6; *see* TR 102. Lastly, the Claimant points out that he was engaged in work-hardening at this time, which occupied four to five hours of his day, and that returning to work at that time would have been impossible because he was tired and in pain afterwards, and because the only positions available at Cashman were in the daytime hours. Cl. Br. at 6; *see* TR 108.

After carefully evaluating the evidence surrounding Cashman's light duty offer, I find that the return to work offer did not constitute suitable alternative employment. First, the Claimant was in intensive four to five hour per day work-hardening therapy, which precluded employment during the hours of therapy. Mr. Joyce admitted that the Claimant would have had to work during daytime hours. In addition, the Claimant credibly testified that he was exhausted and in significant pain following the work-hardening therapy and could not work after these sessions. Second, the Employer never responded to the Claimant's request for further information on the driving position and never told the Claimant that positions other than driving positions were available.[8] In this regard, I note that it was not until the hearing that the Employer, through Mr. Joyce, stated that jobs other than driving jobs were available to the Claimant. One would expect that a sincere return to work effort on the part of the Employer would have generated a response to the Claimant's counsel's numerous letters seeking additional information as to the nature of the position being offered, and would have included an offer of a position the Claimant could actually accept. I find that it is unreasonable to expect the Claimant to accept a return to work offer without the appropriate details, such as duties required and hours to be worked, which the Claimant needed to determine the nature of the position being offered, whether the position was within his physical capabilities and the time constraints of physical therapy.

[8] The Claimant's license was suspended before his injury occurred.

I now turn to the Employer's labor market survey evidence in evaluating whether the Employer has shown that suitable alternative employment opportunities exist. Ms. Torbick identified six positions as suitable alternate employment within the Claimant's capabilities in the labor market survey completed on November 21, 2005. In particular she found two communication equipment operator positions, two automobile self-service station attendant positions, one cashier II position, and one customer service representative position. Ms. Torbick conceded that the automobile self-service station attendant position at the Braintree Square Shell was not appropriate for the Claimant because the position required lifting in excess of the weight limits assigned by his physicians. Ms. Tobrick also acknowledged that the customer service position at Clean Harbors Environmental Services, Inc. was not an appropriate position because of the Claimant's limited typing skills. This leaves four remaining positions which the Employer contends are suitable considering the Claimant's age, experience, education and physical limitations.

The two positions in the communication equipment operator field required computer skills and keyboarding skills. The position at Central Communications required "basic computer skills with keyboarding" and the position at Quincy Telemessaging Applications required "computer keyboarding skills at 10-25 words per minute." EX 17 at 33. Ms. Torbick stated that it would be "difficult to judge" whether the Claimant's limited typing skills would be an impediment to working as a communication equipment operator. TR 127. As discussed above, Ms. Torbick testified that the customer service representative position at Clean Harbors Environmental Services was inappropriate due to the Claimant's limited typing skills. The duties in the communication equipment operator positions were similar in typing requirements to the customer service position, and required "basic computer skills with keyboarding" for a physician's answering service at Central Communications and "ability to handle fast pace" in "answering telephone calls and typing messages into a computer" at Quincy Telemessaging Applications. EX 17 at 32-33. A review of the job descriptions shows that the typing and computer skills required for the positions at Central Communications and Quincy Telemessaging Applications are essentially the same as those required at the Clean Harbors job. As Ms. Tobrick concluded that the Clean Harbors position was not suitable given the Claimant's limited typing skills, I find that the positions at Central Communications and Quincy Telemessaging Applications are equally unsuitable, in light of the limited typing skills the Claimant currently possesses.

Next, I consider the automobile self-service station attendant position at the Plaza Mobil. This position was a cashier job on the night shift and paid $8.25, plus a $.50 shift differential. The position required pricing items, stocking shelves, recording inventory, keeping the cash register, and helping customers. The position required standing for long periods and lifting forty pound boxes of anti-freeze, but Ms. Tobrick stated that this employer indicated it would provide a stool so the employee could sit and would "also provide accommodation for heavier lifting so that would not be required in that job." TR 129. I find that the Claimant was capable of performing this job, taking into account his age, experience, and education. Therefore, the Employer has shown that this position was suitable alternate employment.

Lastly, Ms. Torbick identified one position as a cashier at the Showcase Cinema. This position paid $8.00 per hour. Duties included counting money, making change, and issuing refunds. Although no standing was required, the cashier would be required to sit for long periods. EX 17 at 36. The cashier would be allowed to walk during breaks, and before and after the shift. *Id.* Although the Claimant's doctor did not impose any restrictions on sitting, the Claimant credibly testified that he could not tolerate sitting for prolonged periods. For example, he testified that he often must leave class to walk due to pain and numbness in his leg. TR 53. Based on this testimony, it is unreasonable to think that the Claimant could sit in one place and perform cashier duties for six to eight hours per night, even with a break. Therefore, I cannot find that this position is suitable alternate employment for the Claimant.

I have found that the Employer has identified one position, the automobile self-service station attendant at the Plaza Mobil which is suitable for the Claimant. The Circuit Courts differ on the question of whether a showing of a single alternative job opening is sufficient to satisfy the Employer's burden of establishing that suitable alternative employment is readily available in the Claimant's community for individuals of the same age, experience and education as the Claimant. *Compare Lentz v. Cottman Co.*, 852 F.2d 129 (4th Cir. 1988) (holding that the identification a single job opening is not sufficient to satisfy the employer's burden of showing suitable alternative employment) *with P& M Crane Co. v. Hayes*, 930 F.2d 424 (5th Cir. 1991) (holding that the identification of a single job opening may be sufficient if the employee has a reasonable likelihood of obtaining the position). I will assume *arguendo* that the Employer has satisfied its burden of showing suitable alternate employment by establishing that a position as an automobile self-service station attendant at the Plaza Mobil was available as of November 21, 2005. Therefore, I conclude that the Employer has met its burden of suitable alternate employment.

The Claimant may nevertheless show that the suitable alternate employment is unavailable due to his participation in an OWCP approved rehabilitation program. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994). In the present matter, the Claimant asserts that because he was enrolled in an OWCP approved vocational rehabilitation program which precludes him from working, he is totally disabled for the duration of the rehabilitation program. Cl. Br. at 7 citing *Abbott*, 40 F.3d 122. In contrast, the Employer argues that it has shown suitable alternate employment is available to the Claimant on a full-time basis or alternatively on a part-time basis as he completes his rehabilitation training and coursework. Er. Br. at 17-20. Relying on *Director, OWCP v. Potomac Electric Power Co., (PEPCO*), 449 U.S. 268 (1980), the Employer asserts first that the Claimant's left ankle injury is partial and that his recovery is therefore limited to a scheduled award under Section 8(c) of the Act. *Id.* Alternatively, the Employer attempts to distinguish *Abbott* on the grounds that *Abbott* involved an unscheduled injury. Er. Br. at 20. It acknowledges, however, that the BRB has held in several instances that the *Abbott* principles can apply even in cases of scheduled injuries. Er. Br. at 20; *see Brown* 34 BRBS 195; *Gregory*, 32 BRBS 264; *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000). It argues, therefore, that the factors outlined in *Abbott* and subsequent cases are not met in this case, as the Employer did not agree to the rehabilitation program. Er. Br. at 21.

Taking the Employer's assertion that under *PEPCO* the Claimant's recovery is limited to a schedule award for the left ankle injury, the Employer correctly states that in *PEPCO,* the Supreme Court held that a claimant who suffers a permanent partial disability from an injury to a body part that is specifically identified in the schedule set forth in Section 8(c)(1-21) is limited to benefits provided under the specific schedule. *PEPCO*, 449 U.S. at 282-284. However, in so holding, the Court noted that "since the Section 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled, the schedule becomes irrelevant." 449 U.S. at 277 n.17. Thus, the *PEPCO* analysis comes into play only after there has been a determination that the impairment resulting from an injury is partial not total. That determination has not yet been made in the present matter.

In *Abbott*, the Fifth Circuit held that a claimant may receive continuing total disability compensation where the employer has demonstrated the availability of suitable alternate employment, but the claimant is precluded from working due to his diligent participation in a Department of Labor approved vocational rehabilitation program. 40 F.3d at 127-128. In so holding, the Court pointed out that the degree of disability is not assessed solely on the basis of physical condition; it is also based on factors such as age, education, employment history, rehabilitative potential and the availability of work that the claimant can perform. *Id.* at 127, *citing New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). The Court noted that the objective of vocational rehabilitation is the return of permanently disabled persons to gainful employment commensurate with their physical or mental impairments through a program of reevaluation or redirection of their abilities, or retraining in another occupation. *Abbott*, 40 F.3d at 128, *citing* 20 C.F.R. § 702.501. One goal of vocational retraining is restoring wage-earning capacity or increasing it materially. *Abbott*, 40 F.3d at 128, *citing* 20 C.F.R. § 702.506.

Several subsequent cases, both within and outside the Fifth Circuit, have expounded on *Abbott* to determine whether claimants are entitled to disability benefits while participating in periods of approved vocational retraining. In *Brown v. National Steel & Shipbuilding Co.* and *Castro v. General Construction Co.*, the Benefits Review Board ("BRB" or "Board") applied the *Abbott* principles even though the claimant's injuries were scheduled injuries. *Brown,* 34 BRBS 195 (2001); *Castro*, 37 BRBS 65 (2003). In *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, the BRB enumerated the factors to be considered in assessing whether suitable alternate employment is unavailable due to a claimant's participation in an approved rehabilitation program: (1) whether enrollment in vocational retraining precluded employment; (2) whether the employer agreed to the rehabilitation plan and continued to pay benefits; (3) whether completion of a vocational retraining program would benefit a claimant by increasing his wage-earning capacity; and (4) whether a claimant demonstrated diligence in completing the program. *Gregory*, 32 BRBS at 266. The Board held in *Castro* that no one factor is dispositive. In that case, the employer had opposed the vocational program, but the BRB still found that the Claimant was entitled to total disability benefits pending the completion of vocational rehabilitation. *Castro*, 37 BRBS at 71-72; *see also Newport News Shipbuilding and Dry Dock Co. v. Dir., OWCP* (*Brickhouse*), 315 F.3d 286, 295-296 (4th Cir. 2002) (holding that the question of whether total disability benefits are available to a claimant in a vocational rehabilitation program should not be based on any single factor, but "require[s] consideration of a wide range of the relevant factors in reaching the proper result").

I will apply the factors the Board considered in *Gregory* to the present case. In this case, the Claimant fulfills three of the four enumerated factors. First, the Claimant is enrolled in a two-year full-time vocational retraining program approved and paid for by the Department of Labor's OWCP. CX 10 at 35-71, 67-68, 70. The program, entitled Architectural Technology, will result in an associate of science degree. Mr. La Raia, the vocational counselor under contract with the OWCP, worked with the Claimant for several months in developing the retraining program and obtaining approval from OWCP. The Claimant checks in with Mr. La Raia periodically and must provide him with proof of attendance at his classes, and copies of his grades. I infer from this that there is a minimum performance standard or grade-point average required to maintain participation in the approved retraining program.

The Claimant stated that prior to beginning his courses at Massasoit Community College he had not been in formal schooling for many years. The Claimant testified that he found the architectural technology coursework very challenging. He credibly testified that he spends fifty or more hours per week going to class and studying. He stated that he gets to school at approximately 7:15 a.m., and ends class at 1 p.m. or 1:30 p.m. The Claimant testified that he would study, do research, or stay at school for tutoring after class. The Claimant had no class on Mondays but he testified that he spends much of his free time, including weekends, studying. The Claimant also reported that he expected the spring semester to be even more time consuming because of the difficulty of his classes and his schedule, which includes more lab time. The Claimant testified credibly that after attending classes he must rest his leg for approximately an hour every day when he gets home. Lastly, he stated that because his school and study schedule require substantial effort and time, he did not believe that he could work while attending school.[9]

The second factor is whether the employer agreed to the rehabilitation plan and continued payment of benefits. The Employer in this case did not agree to the program. Er. Br. at 21. It discontinued benefits as of February 22, 2005. The question of whether the Employer approved of the vocational retraining program is one of several factors considered in determining whether suitable employment is realistically unavailable because an individual is participating in an approved vocational retraining program.

The third factor is whether the completion of the vocational training will benefit the Claimant by increasing his wage earning capacity. Based upon his research, Mr. La Raia opined that the Claimant could expect to earn $42,000 to a high of $48,000 per year upon graduation from the CAD program at Massasoit Community College. The Employer's vocational expert, Ms. Torbick, found one position which I have determined suitable for the Claimant, considering his physical limitations, age, experience, and education. This position

[9] The Employer's assertion that the Claimant had previously attended an apprenticeship program with the Operating Engineers working full-time and so he could now take classes and work full-time is unpersuasive. Er. Br. at 20. Unlike the instance the Employer points to, the Claimant has now experienced a significant left ankle injury that limits mobility and results in pain and discomfort requiring periods of rest on a daily basis. In addition, there is no evidence that the prior apprenticeship program required English, mathematical and scientific lab coursework, which the program at Massasoit Community College requires and, which the Claimant stated are difficult for him, requiring an extra time commitment.

was an automobile self-service station attendant which paid $8.25 plus a shift differential of $.50 per hour. This is equivalent to $350.00 per week, if the Claimant were to work forty hours per week, or $18,200 per year. His earnings upon completion of the vocational rehabilitation program at Massasoit Community College are significantly higher than his earning capacity as an automobile self-service station attendant. Therefore, I find that the Claimant has shown that the vocational program would substantially increase his earning capacity.

Lastly, I must consider whether the Claimant has demonstrated diligence in completing the program. The Claimant testified that he spends fifty or more hours per week between studying and attending classes, and that he spends much of his free time studying. He also testified that he uses the school tutoring services often. The Claimant testified that he only missed one day of school in the fall semester, due to a deposition. The Claimant's diligence and commitment to the academic rehabilitation program is demonstrated by the grades he received for his Fall Semester coursework. He received an overall grade point average of 3.54, with a "B+" in the College Experience, an "A-" in Electrical Systems, an "A" in Introduction to Writing, a "B" in Computer Aided Drafting, and "A-" in Fundamentals of Math. CX 12. I find that the Claimant has demonstrated diligence in participating in and completing the vocational rehabilitation program.

After reviewing the requirements of the approved vocational program, a full-time courseload and minimum performance standard or grade-point, as well as the Claimant's testimony as to the time he is required to invest to successfully complete the coursework, I find, that the alternate employment as an automobile self-service station attendant was reasonably unavailable to the Claimant due to his enrollment in the approved vocational rehabilitation program. Completion of the vocational retraining program will benefit the Claimant by significantly increasing his wage-earning capacity, and promote the goal of returning the Claimant to gainful employment. The Claimant has demonstrated diligence in completing the program. Although he has failed to show that the Employer agreed to the program and continued to pay benefits during his enrollment in the program, as discussed above, no one factor is determinative in analyzing whether the suitable alternate employment is unavailable due to participation in an approved rehabilitation program. *Brickhouse*, 315 F.3d at 295; *Castro*, 37 BRBS at 71-72. The fact that there is no evidence the Employer agreed to the rehabilitation plan is not determinative. Accordingly, based upon the totality of the factors, I find that suitable alternate employment is reasonably unavailable to the Claimant due to his participation in an OWCP approved rehabilitation program. The Claimant is totally disabled and entitled to compensation from the date of maximum medical improvement until completion or discontinuance of the vocational rehabilitation program.

F. Entitlement to Permanent Partial Disability Benefits

The Claimant contends that he should receive permanent partial disability compensation for a 20% impairment to his left lower extremity, upon completion or discontinuance of the vocational rehabilitation plan. Cl. Br. at 11. The Employer argues that "[i]n the event that this court awards total disability benefits, it cannot award claimant permanent partial until

those benefits end pursuant to *ITO Baltimore*."[10] I assume that the Employer refers to *ITO Corp. of Baltimore v. Green*, 185 F.3d 239 (4th Cir. 1999). In that case, which involved a claimant who had two scheduled injuries, the Fourth Circuit held that "[i]n no case should the rate of compensation for a partial disability, or combination of partial disabilities, exceed that payable to the claimant in the event of a total disability." *Green*, 185 F.3d at 243. I fail to see how *Green*, which dealt with a claimant who had two scheduled injuries, bears on the present case, in which the Claimant has one injury which renders him permanently totally disabled, presumably for a closed period until completion of his vocational re-training program, and permanently partially disabled with a 17.5% impairment of the left foot thereafter.

The Employer correctly states that a claimant cannot be compensated for total and partial disability benefits at the same time. *See*, *e.g. Korineck v. Gen. Dynamics Corp.*, 835 F.2d 42, 43 (2d Cir. 1987) (a claimant receiving permanent total disability benefits was not also entitled to benefits under the schedule for a hearing loss). However, in this case, the Claimant is not asking for benefits to be awarded during the same period; rather, he is requesting that he be compensated for a permanent partial disability *after* his period of permanent total disability ends. Therefore, this case is distinguishable from *Korineck* and others like it which hold that permanent total and permanent partial benefits may not be awarded concurrently because the awards in this case would be consecutive, not concurrent. An award for permanent total disability recognizes that the injured individual has lost all earning capacity during the period of permanent total disability, whereas a permanent partial disability under the Section 8(c) schedule of injuries compensates the individual for loss of use of the body part. Therefore, the Claimant is entitled to an award for permanent partial disability benefits after he completes or discontinues his full time vocational rehabilitation program and is no longer deemed permanently and totally disabled.

As the Claimant will be entitled to disability compensation under the schedule set forth in Section 8(c) of the Act, I must determine whether the Claimant's left ankle injury is an injury to the foot or leg. Ankle injuries are not specifically mentioned in the schedule; rather, the schedule provides 280 weeks' compensation for the loss of a leg, and 250 weeks' compensation for the loss of a foot. 33 U.S.C. § 908 (c)(2, 4). Several BRB decisions have found that an impairment to the ankle constitutes an injury to the foot, and therefore that such an impairment is compensable under Section 8(c)(4) of the Act. *See*, *e.g. Cotton v. Army & Air Force Exch. Svcs.*, 34 BRB 88 (2000). Likewise, on the facts of this case, an award under Section 8(c)(4) of the Act is appropriate. Most of the Claimant's medical records focus on the talus, which is a bone in the ankle, but Dr. Tornetta makes reference to a need to address range of motion issues in the midfoot joint in addition to the ankle and subtalar joint. EX 15 at 29. Therefore, I find that the Claimant's injury is compensable under Section 8(c)(4) of the Act.

G. <u>The Discontinuation of Benefits without Notice</u>

The Claimant argues that the Employer is liable for penalties under Sections 14(g) and 14(e) of the Act. The Claimant first asserts that the Employer ceased making payments to the Claimant on February 22, 2005, without notifying the Deputy Commissioner (now Director or

[10] This is the Employer's only statement on this point. The Employer offers no citation for its assertion.

District Director) of the Office of Worker's Compensation Programs as required by 33 U.S.C. § 914(g) and is therefore liable for a $100.00 penalty. Cl. Br. at 9. Notice was provided on May 26, 2005, more that three months after benefits were terminated by the employer. *Id.* The Employer argues that "there is no penalty imposed under the LHWCA when an insurer terminates claimant's benefits without prior notice." Er. Br. at 21. The Employer claims that it terminated benefits "due to the fact that the insurer reasonably believed that the claimant reached maximum medical improvement months beforehand resulting in an over payment." *Id.*

Under 33 U.S.C. § 914(g), an employer who ceases payments without notice to the deputy commissioner within sixteen days of the last payment is liable for a civil penalty of $100.00. There is no dispute that the Employer did not provide such notice until May 26, 2005, more than three months after benefits were terminated. However, when read in conjunction with 33 U.S.C. § 914(h) and (i), after receiving notice from a person entitled to compensation that benefits have been terminated the district director may initiate an investigation which may result in a civil penalty of $100. It does not appear that that such a procedure was invoked in this case. Therefore, a civil penalty is not appropriate.

The Claimant also argues that since the Employer did not file a Notice of Controversion as required by 33 U.S.C. § 914(d) until May 26, 2005, it is liable for 10% interest on any judgment awarded for the period of February 22, 2005 to May 26, 2005. Cl. Br. at 10. The Employer argues that "there is no penalty imposed under the LHWCA when an insurer terminates claimant's benefits without prior notice" and that it "terminated benefits due to the fact that the insurer reasonably believed that the claimant reached maximum medical improvement months beforehand resulting in an over payment." Er. Br. at 21.

Section 14 (e) of the Act provides that "[i]f any installment or compensation payable without an award is not paid within fourteen days after it becomes due…there shall be added to such unpaid installment an amount equal to 10 per centum thereof…unless notice is filed under subdivision (d) of this section…" 33 U.S.C. § 914(e). The BRB has held that an employer must pay compensation, controvert liability or show irreparable injury to avoid liability under Section 14(e). *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981). In this case, the Employer can not show any of these mitigating factors. The Employer's argument that it "reasonably believed" that an overpayment had resulted is not relevant to the issue of interest under Section 14 (e). *See*, *Dir., OWCP v. Cooper Assocs. Inc.*, 607 F.2d 1385, 1389 (D.C. Cir. 1979); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 220, *on recons.*, 25 BRBS 88 (1991). Therefore, the Employer is liable for 10% interest on all benefits awarded for the period February 22, 2005 through May 26, 2005.

H. Computation of Benefits

Pursuant to 33 U.S.C. § 908(b), the Claimant is entitled to temporary total disability benefits from November 25, 2003 through February 8, 2005, the date of maximum medical improvement, at a rate of 66 2/3 percent of his average weekly wage of $2,500.00. However, Section 6(b) of the Act establishes a maximum disability compensation benefit providing that compensation for disability "shall not exceed an amount equal to 200 per centum of the

applicable national average weekly wage, as determined by the Secretary…" 33 U.S.C. § 906(b). The maximum compensation benefit rate at the time of injury in November 2003 was $1,031.78. Therefore, the maximum weekly compensation benefit the Claimant is entitled to for the period of temporary total disability is $1,031.78, subject to the annual cost of living adjustment.

Pursuant to 33 U.S.C. § 908(a), the Claimant is entitled to a period of permanent total disability benefits from February 8, 2005, the date of maximum medical improvement, until he completes or discontinues the approved vocational rehabilitation program, at a rate of 66 2/3 of his average weekly wage of $2,500.00. As discussed above, the maximum weekly disability compensation benefit the Claimant is entitled to is $1,031.78 for the period of permanent total disability, subject to the annual cost of living adjustment to the maximum benefit award. The Claimant is also entitled to 10% interest for payments due for the period February 22, 2005 through May 26, 2005 pursuant to 33 U.S.C. § 914(e).

After the Claimant completes or discontinues the rehabilitation program, he is also entitled to compensation for a 17.5% permanent partial impairment of the foot under the schedule of injuries in Section 8(c)(4) of the Act. 33 U.S.C. § 908(c)(4). The parties have stipulated that the Claimant's average weekly wage is $2,500.00, equating to a maximum weekly benefit of $1,031.78, and the duration of his compensation entitlement is determined by multiplying the maximum number of weeks (250) by the percentage of impairment. *MacLeod v. Bethlehem Steel Corp*., 20 BRBS 234, 237, n.4 (1988). The period of the Claimant's compensation entitlement shall commence upon the Claimant's completion or discontinuance from his full time vocational rehabilitation training.

I. Interest Due

The first installment of compensation under the LHWCA becomes due fourteen days after a claimant gives notice to the employer of an injury or the employer has knowledge of the injury. 33 U.S.C. § 914(b) (2001). In this case, the Employer ceased making payments on February 22, 2005. Since compensation payments after this date were not timely made, I find that the Claimant is entitled to an award of interest. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). The interest shall be assessed as of the date the Claimant's compensation became due. *Wilkerson v. Ingalls Shipbuilding, Inc*., 125 F.3d 904, 907-908 (5th Cir. 1997). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

J. Medical Care

Pursuant to Section 7 of the Act, the Employer remains responsible for providing reasonable and necessary medical care for the Claimant's work-related left ankle injury. 33 U.S.C. § 907(a); s*ee also Ingalls Shipbuilding, Inc. v. Dir., OWCP*, 991 F.2d 163, 165-166 (5th Cir. 1993). As the left ankle injury is related to the Claimant's employment with

Cashman, the Employer is responsible for reasonable and necessary medical care for that injury.

K. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). My Order will grant the Claimant's counsel 30 days from the date this order is issued in which to file a fee petition. The Employer will have 15 days from the entry of the Claimant's fee petition to file any objection.

ORDER

1. The Employer, Jay Cashman, Inc., and its Carrier, Commerce and Industry c/o AIGCS, shall pay directly to the Claimant, Matthew Connolly, temporary total disability benefits pursuant to 33 U.S.C. §§ 908(b) and 906(b) of the Act, from November 25, 2003 through February 8, 2005, at a rate equal $1,031.78 per week;

2. The Employer shall pay directly to the Claimant permanent total disability payments beginning on February 9, 2005 and continuing until he completes or discontinues full-time participation in the approved vocational rehabilitation program, at a weekly compensation rate of $1,031.78 subject to annual cost of living adjustments pursuant to 33 U.S.C. §§ 908(a), 906(b) and 910(f);

3. The Employer and Carrier shall pay the Claimant permanent partial disability benefits for a 17.5% permanent impairment of the left foot pursuant to 33 U.S.C. § 908(c)(4);

4. The Employer shall pay to the Claimant 10% interest on past due compensation for the period February 22, 2005 through May 26, 2005 pursuant to 33 U.S.C. § 914(e);

5. The Employer is entitled to a credit for disability compensation benefits previously paid;

6. The Employer shall pay to the Claimant interest on all past due compensation benefits at the rate provided by 28 U.S.C. § 1961 (2003), computed from the date each payment was originally due until paid, and the applicable rate shall be determined as of the filing date of this Decision and Order with the District Director;

7. The Employer shall provide the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related ankle injury may require;

8. The Claimant's attorney shall file an itemized fee petition within 30 days of the issuance of this order, and the Employer shall have 15 days thereafter to file any objection.

All computations of benefits and other calculations are subject to verification and adjustment by the District Director.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts